No. 84-1279

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF DELAWARE,
Petitioner

v.

ROBERT E. VAN ARSDALL,
Respondent

On Petition For Writ Of Certiorari
To The Supreme Court Of Delaware

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The State of Delaware, the petitioner, is acutely aware that this Court does not sit to correct every error committed by the State and lower federal courts in their application of settled constitutional principles and that institutional limitations make this Court reluctant to undertake its own review of a trial record to determine the harmlessness of the error in all cases in which the prosecutor advances that conclusion. This petition asks this Court to do neither of those tasks. Rather, it only asks this Court to free the prosecution from the shackles of the principle of automatic reversal, mistakenly conceived as a federal constitutional imperative by the court below, so that it may carry its burden of demonstrating that the Confrontation Clause error was harmless.

Secondly, Delaware believes that, in light of the position now advanced by the Respondent, common sense fairness requires that this petition be granted.

Reasons for Granting the Writ

1. Respondent Has Changed His Position

Van Arsdall does not dispute that the state and lower federal courts have given various inconsistent answers to the question of the appropriate interplay between the cross-examination guarantee announced in *Davis v. Alaska*, 415 U.S. 308 (1973) and the principle of constitutional harmless error. Brief in Opposition at 18-19 & nn. 25-27.[1] Moreover, he acknowledges that other jurisdictions have rejected the rule of automatic reversal, pioneered by the Ninth Circuit and now adopted, in an expansive form, by the Delaware court below.[2]

Van Arsdall argued vehemently to the court below that the Confrontation Clause required a rule of automatic reversal for erroneous restrictions on "bias" cross-examination of *any* prosecution witness, without any in-

1. The confusion is best demonstrated by other courts' reactions to the purported two-tiered review process utilized by the Delaware court. It has been criticized as conflicting with *Davis*. *Carillo v. Perkins*, 723 F.2d 1165, 1171 (5th Cir. 1984). Moreover, its total/partial prohibition dichotomy has led to uneven application. For example, where the prosecution witness has been asked if he had made a "deal" with the prosecutor, but the defendant has been precluded from eliciting evidence that criminal charges have been dismissed, the courts have reached differing results. *Compare Carillo*, 723 F.2d at 1171-72 (error was partial restriction so harmless error analysis available) *with State v. Parillo*, 480 A.2d 1349, 1357-58 (R.I. 1984) (error was *in limine* total prohibition requiring automatic reversal).

2. *United States v. Duhart*, 511 F.2d 7, 9 (6th Cir.), *cert. dismissed*, 421 U.S. 1006 (1975) (total exclusion of evidence of criminal charges pending against witness was harmless error); *Ransey v. State*, 680 P.2d 596, 597-98 (Nev. 1984) (total exclusion of evidence of witness' racial prejudice was harmless error).

quiry into the content and prejudicial effect of the not fully impeachable testimony. Reply Brief for Appellant (Robert E. Van Arsdall) at 10-17, *Van Arsdall v. State*, 486 A.2d 1 (Del. 1984) ("it is equally clear that in *Davis v. Alaska*, the United States Supreme Court . . . held that a denial of the right of cross-examination is a deprivation of a right so fundamental that it always requires reversal."). The opinion below tracked both the structure and language of Van Arsdall's argument.

Now, contrary to his position below, he implicitly concedes that harmless error analysis, keyed to whether the witness' testimony provided a "crucial link in the proof" of the crime, *Davis*, 415 U.S. at 317, is indeed appropriate. Brief in Opposition at 16-17.[3] To avoid the necessary implication of this change of position, he asserts that the court below ignored its own conclusion that, in light of the erroneous restriction, "the actual prejudicial impact of such an error [would] not be examined and reversal is mandated," Pet. App. at A-7, and, instead, it silently determined the impact of Fleetwood's direct testimony in the context of the entire trial record. Brief in Opposition at 16-17. Any reasonable reading of the opinion of the Delaware court belies Van Arsdall's assertion of such a silent evaluation.[4]

3. Pointedly, in an effort to have some foundation for the position he asserted below, Van Arsdall omits the modifier "crucial" in his recitation of the *Davis* quotation.

4. Van Arsdall, to show this evaluation of the impact of the testimony, relies on the court's quotations that "some topics will be of marginal relevance and that the trial court in such situations may properly prohibit cross-examination or allow only limited questioning," Pet. App. at A-5, quoting *Weber v. State*, 457 A.2d 674, 682 (Del. 1983) and "[t]he question of bias was an important issue before the court." Pet. App. at A-5. When read in context, it is obvious that the statements are references to whether the proffered impeachment evidence was probative of bias and not an evaluation of the prejudicial effect of the not fully impeached direct testimony. Indeed, Van Arsdall recognized the thrust of the quoted material below. Reply Brief of Appellant (Robert Van Arsdall) at 14, *Van Arsdall*

Unless this Court is convinced that the automatic reversal rule crafted by the Delaware court correctly flows from the Confrontation Clause, a fundamental sense of fairness suggests that this petition be granted.[5] If review is denied, Van Arsdall will have succeeded in overturning his convictions on the basis of a legal principle, automatic reversal, which he now implicitly recognizes is erroneous. Such tactics threaten the very societal and jurisprudential values which underlie the harmless error doctrine.[6]

2. No Manifest Harm Exists

In an effort to preclude scrutiny of the rule of automatic reversal that he foisted on the Delaware court as a constitutional imperative, Van Arsdall suggests that review must be denied because even if such a rule was erroneous, the court below would have unquestionably found the restriction as not harmless beyond a reasonable doubt. As his solitary support for that assertion, he argues that the prosecutor used, in a damaging fashion, Fleetwood's testimony by asking Van Arsdall on cross-examination whether he had gone across the hall to kill

NOTES *(Continued)*

(after referring to the quote from *Weber*, stating that "such a prohibition on cross-examination, however, only has application to the evidence proffered to prove bias, not to the evidence offered on direct examination of the witness").

5. "[J]ustice, though due the accused, is due the accuser also. The concept of fairness must not be so strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

6. It is no answer, as Van Arsdall suggests, that the automatic reversal rule is itself harmless. Brief in Opposition at 25. Van Arsdall's belated change of position will not remove the automatic reversal rule from federal constitutional jurisprudence in Delaware. Secondly, any retrial of Van Arsdall would require witnesses, if presently available, to recollect events occurring three years ago. Finally, if the first trial was not unfair, a second trial offers gratuitously to Van Arsdall the possibility for additional errors, threatening to prolong interminably this litigation.

Fleetwood. Brief in Opposition at 23-24, referring to Tr. X78 (Van Arsdall). As shown by that portion of the prosecutor's cross-examination, reproduced at D-1 in the Appendix to this Reply Brief, the record does not support his assertion.

First, in that cross-examination, the prosecutor did not refer to Fleetwood's testimony. Secondly the supposedly devastating "provocative question" sprang not from any of Fleetwood's testimony but from Van Arsdall's response to a question posed just moments before. There, the prosecutor asked Van Arsdall if he knew who was across the hall when, after the murder, he carried the knife to Fleetwood's apartment. Van Arsdall responded that "[a]ll I know, Fleetwood was across there." App. D-1. The impetus for the following question concerning killing Fleetwood came from Van Arsdall's own admission he knew Fleetwood was in his apartment.[7]

Finally, the theory of the prosecution now offered by Van Arsdall in an effort to make an error harmful was never mentioned to the jury. In fact, the prosecutor told the jury in his summation that the evidence did not reflect why Van Arsdall had gone across the hall. Indeed, the prosecutor never referred to Fleetwood's testimony in his opening statement and mentioned it, only in passing, in his closing argument. Van Arsdall's make-weight assertion of manifest harm should not be allowed to preclude this Court from scrutinizing the automatic reversal rule.

7. Fleetwood did not testify that Van Arsdall had seen him when he glanced into Pregent's apartment near 11:30 p.m.

Conclusion

With the continuing confusion of the lower courts, and particularly in light of the positions now advanced by the Respondent, this petition should be granted and the rule of automatic reversal for Confrontation Clause errors be overturned.

March 15, 1985 Respectfully submitted,

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APPENDIX

APPENDIX D

Excerpts of Trial Transcript Volume X at 78-79
Cross Examination of Robert Van Arsdall

[78]

. . .

(Prosecutor) Q. You said you took the knife across the hallway when you took it away from Pregent to have something to defend yourself?

(Van Arsdall) A. Yes.

Q. Are you sure when you did that Pregent wasn't in the bathroom in his apartment washing up?

A. Yes, I am sure.

Q. Do you know when he washed up, if he did?

A. I don't know when he washed up really.

Q. Did you know who was across the hall?

A. All I know, Fleetwood was across there.

Q. When did you last see him?

A. The second time I was there.

Q. What was he doing at that time?

A. He was drinking.

Q. That's all you thought was across the hall was Fleetwood?

A. Yes.

Q. Are you sure you didn't go across the hall to kill him?

A. Yes, I'm sure.

[79]

Q. How did you carry the knife across the hall when you went in there?

A. Carried it loosely in my hand.

Q. Just holding it out?

A. The blade was like this (indicating). Just loosely in my hand.

Q. Were you displaying the knife when you went in?

A. I just walked in there casually with it.

Q. You walked in there casually with it?

A. Sort of.

Q. What do you mean sort of casually with the knife?

A. I had it hanging down. My arm was hanging loose.

Q. Were you holding it by the blade or by the handle?

A. Partially blade, partially handle.

Q. Sort of in the middle there then?

A. Yes.

Q. Were you trying to hide it —

A. No.

Q. — as you went in there?

A. No, I was not.